No. 531.

Brief of Jones for P. C. on pet'n for rehearing.

Distributed May 17, 1897.

IN THE

Supreme Court of the United States,

APPLICATION FOR REHEARING

IN THE CASE OF

HENRY WILLIAMS

No. 531. VS.

THE STATE OF MISSISSIPPI.

Brief of Plaintiff in Error.

CORNELIUS J. JONES,
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HAYWORTH PUBLISHING HOUSE, WASHINGTON, D. C.

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Plaintiff informs the Court, that under the laws of Mississippi, no person is eligible to jury service unless he is duly registered. The Supreme Court of Mississippi (unintentionally), did the accused a striking injustice in the rendition of the opinion, by stating a certain matter as charged in the motion to quash the indictment, which (we beg leave to say) is not charged; and the statement that it is charged, materially changes plaintiff's position in the principles contended for: (page 41 Rec.—first sentence) (page 41 of Record). "He" (plaintiff) "did not intend to charge by the motion, that the officers by whom the grand jury was selected violated the law, but that they were by the law, under which they acted, required to select jurors from certain lists furnished them by the officers charged with the duty of holding elections in the State, and that these election officers in making such lists discriminated against the race of appellant. In this view the motion was properly denied, for the reason that jurors are not selected from or with reference to any list furnished by such election officers."

This Court will see, that from the opinion of the State Court, the judgment of affirmance is based upon only one fact; that is, that the motion to quash was properly overruled upon what the Court said; "In this view the motion was properly denied." We are free to admit that no such law exists, and plaintiff states, with the greatest consideration for our Honorable State Supreme Court, that no such charge is apparent upon plaintiff's motion to quash the indictment. The State Court was misled in this assertion, the plaintiff's position was mistaken, and this being "the view" taken by the State Court, influenced it to affirm the judgment of the trial court. It is seen from the language of this Court (on page 7 of the opinion), that the same misapprehension prevailed with this Court at the former consideration of this case. The State Court erred in its conception of the allegation of plaintiff's motion to quash the indictment, and this Court labored under a serious misapprehension as to that feature of the motion. And if plaintiff can convince this Court (~~Which it be~~ from the Record), that it was mistaken in a material fact upon which the judgment was rendered, out of judicial magnanimity, the error will be corrected.

Now as to the correctness of plaintiff's position as to this allegation in the motion, we must take the record. It must be conceded that it is upon this one point the State Court affirmed the trial Court. The Record shows that that Court declared, that as to the other questions it had no jurisdiction, by the following language (page 40 of Record.) "At this point in the investigation it is sufficient to say, that we have no power to investigate or decide upon the private individual purposes of those who framed the Constitution, the political or social complexion of the body of the Convention, and have no concern with the representation of the State in Congress." The State Court arrived at this conclusion after having considered every allegation of the motion, and petition for removal. The Court did not question the sufficiency of the pleadings nor the proof supporting the same. The Supreme Court did not go behind the record of the pleadings and proof, which were admitted in the trial Court. That Court indorsed the pleadings as consistent with the practice in the

State in the following words, (page 44 of Record:) "we have dealt with the case upon the assumption that the facts set out in the motion are true. No objection was made in the Court below because the proof was made by affidavits instead of witnesses, and it is common practice in our Courts, in the absence of objection, to hear affidavits on motions." This admission of the State Court must bind this Court upon matters which were not put in issue in trial Court, as effectual as the State Supreme Court felt itself bound thereby. Plaintiff has searched in vain for a single case where this Court has ever gone behind the admissions of the parties in the State Courts and questioned the sufficiency of pleading and proof which were admitted to be true by the parties charged.

This fact settled, we find that the Court affirmed the judgment of the State Court, upon alleged statement of the accused in motion to quash the indictment. As to the jury list furnished by the election officers, plaintiff asks the Court to read his motion (page 3 of Record) in the light of the following facts: Section 3644 of Code 1892 makes the managers of election at the various precincts, judges of the qualifications of electors, even though said electors are duly registered. Therefore, although there is a registration roll in the county, it is not a *prima facia* roll of voters in the county. The reason is, because after persons are duly registered, they must pass the judgment of the election managers before they can vote, as provided in Section 3644, Code 92.

The Court will see from Section 2358 of Code 1892, that the legislature provided that at a certain time there mentioned, the Board of Supervisors should select a list of persons to serve as jurors for each respective term of Court. And that in selecting the list of persons to serve as jurors, the Board of Supervisors should use as a guide the Registration book of voters. The point aimed at by plaintiff's motion is, that as the election officers are by the law made judges of qualifications of electors, though such electors are duly registered, that the law (Section 2358) providing that the Board of Supervisors should use as a guide in selecting jurors, the registration book of voters, that thereby the registration books of

the county were not the *prima facia* registration books of *voters*. And that as there was no law providing the mode of procuring a list of such as had been passed upon by the election managers, as such adjudged, the list selected by the Board of Supervisors from the registration book of the county was not valid. The Statutes of the State are ambiguous on this subject and plaintiff sought the advantage of attacking the list of jurors selected from the registration books simply, while the law had provided no mode of preparing registration books of voters, yet at the same time required the list to be taken from that source. The motion does not show any such charge as influenced the State Court page 41 of Record (for the motion shows the following:) "That there is no registration book of voters prepared for the guidance of said officers at the time said grand jury was drawn. *That there is no Statute providing for the procurement of any registration book of voters.*" That Court erroneously assumed a fact to be of Record in the motion, which did not exist. Yet from the very language of the Court, that fact is the one upon which it affirmed the judgment of the trial Court, because after stating what it assumed to be the allegation, and announced its conclusion thereupon, the Court said: "*In this view* the motion was properly denied." Under what view? Under the view that the motion alleged that the officers charged with listing jurors at that term of the Court, by the law under which they acted, were required to select such jurors from certain lists furnished to them by the officers charged with the duty of holding elections in the State; and that these election officers in making such lists discriminated against the race of appellant. That Court was in error in considering any such statement, for no such appears anywhere upon the whole Record. But we find that this Court was misled and affirmed the judgment of the Supreme Court upon the same misconception of a fact, (page 7 of opinion.) "We gather from statements of the motion that certain officers are invested with discretion in making up list of electors; and that this discretion can be, and has been exercised against the colored race, and from these lists jurors are selected. The Supreme Court of Mississippi however decided

in a case presenting the same questions as the one at bar, that jurors are not selected with reference to any lists furnished by such election officers."

This is a great injustice to both this Court and to the accused. We beg pardon therefore but must state that, he made no such allegation in the motion to quash. Yet this Court was unsuspectingly misled by the statement made in the opinion of the State Court. Plaintiff cannot dare suggest what influenced the Honorable State Court to state such to be a fact, but there is one positive declaration that no such fact exists. And the judgment of affirmance is erroneous because based upon erroneous grounds, which a review of the motion will clearly show.

The next error plaintiff respectfully calls attention of the Court to is, that on page 6 of the opinion, this Honorable Court states that the *only* allegation of any discriminative acts of the administrative officers, is the allegation quoted on that page in second paragraph. Of course it is conceded that that is the only allegation the Court considered; and thereupon declared it insufficient to establish the fact of discrimination by the administrative officers. Plaintiff insists now as formerly stated in this brief, that as the State Courts admitted the sufficiency of the allegations of the motion, and under the proof offered, the facts therein alleged were assumed to be true, and in harmony with the practice in the State Courts, the questions of sufficiency and proof were not in issue in the State Courts, and it is against the policy of this Court to question the sufficiency of pleadings and proof which are admitted by the parties. In Neal vs. Delaware this Court held, that as the motion to quash the indictment was not supported by separate affidavits the proof was not sufficient; but as there was an agreement between the attorney for the accused and the Attorney General, that the motion should be considered as if proper affidavits were attached, this Court considered itself bound by the agreement of the parties in the trial Court, and did not inquire into the question of proof sufficiency.

In the case of Gibson vs. Mississippi, 162 U. S., this Court held that the plaintiff's allegations were sufficient, but

as no separate affidavits supported the motion, and unlike the Delaware case, in, that no agreement was had in the trial Court between the State's counsel and the accused, therefore the motion could not be considered as if the necessary affidavits were attached: the case was affirmed for the want of proof. In the case at ~~the~~ bar, we have the pleadings supported by just that character of proof which this Court said was wanting in the Gibson case which proof is admitted by the trial and Supreme Court of the State to be true, and in accordance with the State practice; still this Court goes behind the admisssions of the parties below, behind the common practice in the State Courts generally, and declares pleadings and proof in this cause insufficient, although, according to the State practice, such allegations and proof are sufficient. In proceeding in the State Courts the parties are required to adhere to that practice, and when this Court practically reverses the State practice by overruling pleadings and proof which according to the State practice are admitted by the party charged, there will be no substantial practice in the State upon which parties can rely; and each case will have to be determined upon its own exigency; but if the Court will insist upon this ruling, with respect to the allegation quoted in the opinion as the only allegation, and that that allegation is insufficient, we feel certain that if we call attention to other more precise allegations in the motion which were unintentionally overlooked, the Court out of a spirit of substantial justice will correct the injury which its present judgement is certain to inflict upon the accused. The Court overlooked the further allegation of the motion, which reads as follows: "it is the enforcement of all these laws, for the reasons aforesaid, that the defendant has been by this proceeding deprived of the immumity prescribed by the letter and spirit of the Federal Constitution, 14th ammendment thereof, and the discretion purposely provided therein to be exercised by certain officers therein mentioned, abridges the rights of defendant, and the rights of 190,000 negroes of the State, citizens of the United States to vote." "That the said laws were so framed and enacted as complained of, for the specific purposes of depriving the majority of citizens and electors, of the State, of the full, free

and impartial enjoyment of the right of elective franchise, because of their previous condition of servitude," etc. Further alleged; "The use of which discretion can be, has been and is being used by certain officers of the County and State to the end designed and intended by the makers of the said laws at the time of said enactment thereof, and as here complained of to wit: abridgement of the elective franchise of the colored voters of the State and County aforesaid, thereby denying to the colored citizens of the State aforesaid the opportunity of being impartially listed and selected to serve as jurors in the circuit and other courts of the County. That this denial to them of equal protection of the laws of the State of Mississippi is on account of their race and color and the said discretion is not used *with equal rigor against the white applicants for registration and voting by the officers of the law.*"

Further, "That by virtue of the exercise of such discretion as provided in the Constitution and Statutes aforesaid, which discretion is to be exercised by certain officers, therein named, was purposely provided in the organic law, which other than the use of said discretionary power by the said officers, with the intent aforesaid, said colored citizens would satisfy the other requirements even of the new Constitution of 1890 and statutes enacted thereunder. The accused is by force of the laws and acts of the officers in the enforcement thereof, deprived of that equal protection of the laws of the State to which he is entitled under the 14th amendment to the Federal Constitution. Relator cannot enforce his right to a full, fair, legal trial in said State courts."

The Court will find that the allegations quoted were overlooked. Plaintiff urges the Court to give him the benefit of a rehearing, that these material charges shall be considered as well as the one allegation upon which the Court based its former judment. We judge from the opinion that this Court is impressed that it is the nonpayment of taxes by the colored citizens which largely marks the disfranchisement so bitterly complained of; But when the Court considers, the additional averments of the pleadings, it will be seen that the accused alleged that other than the unjust discrimination against his

race by virtue of the evil exercise of the vested discretion by the officers of the law, the colored citizens would satisfy the requirements even of the present Constitution. This Court cannot question this allegation, especially when it is admitted by the State court to be true.

The next point is, that it is the refusal to register the colored electors which keeps their names off the registration books; and under the custom, the list of jurors are taken from the registration roll of the County at a certain time, by the Board of Supervisors. And the complaint is made against the registrar in wrongfully refusing these people registration. This registrar is under the law the chief jury commission in preparing the jury box with names and drawing the names therefrom, for each term of court.

The next erroneous impression is, that the applicant for registration must have paid all taxes due as provided before he can be registered. This is an error. The State Supreme Court has long decided that the Section of the Code requiring the prepayment of taxes for registration, was unconstitutional; therefore the tax feature of the law would operate against one offering to cast his vote on election day, but not at the registrar's office, when he applies for registration: and as it is the registration book used for jury selection, it is clearly shown, that the jury manipulators are not required to exclude the colored race from their selection of jurors, for the registrar has done that job long beforehand by simply refusing to register its members. And it is the unlimited discretion imposed in this officer by the laws, which vests in him the power to discriminate against the colored race. The scheme works in two ways: The refusal to register the colored electors denies them the right to jury service also the privilege of voting.

Plaintiff informs the Court, that under section 242 of the Constitution, the registrar of the several counties is the principal agent by whom the scheme of restricting the negro suffrage of the respectives counties is to be accomplished. That section prescribes that the applicant for registration must first, make oath that he possesses all the specific qualifications mentioned in section 241; that is, that he has not been

convicted of the crimes mentioned, has effected the desired residence, and other specifications.

The applicant must also swear to answer all questions propounded to him concerning his antecedents so far as they relate to his right to vote. What are the antecedents, about which the administrative officer is here empowered to interrogate the applicant! If the applicant has sworn to all the qualifications specially required of him by the Constitution, and if the framers of the Constitution meant that this discretionary examination by the registrar, should (as this Court declared) "reach weak and vicious white men as well as weak and vicious black men." Why is it that the specific facts as touch the applicant's antecedents, were not specified upon the face of the law; that the such applicant might know where the end of the ordeal was, as well as he is informed by the law, of the qualifications required? It is admitted that the specific qualifications as required of the voter, do apply in terms to the "weak and vicious" of both races: but by the averements of plaintiff's motion, it will be seen that the specific qualifications are not complained of.

If the exercise of suffrage by all persons who could come up to the specified qualifications were all that the framers intended, the examination should terminate after the oath concerning them was made by the applicant. But no; even after the gauntlet has been thus run by the dusky applicant for registration, the Constitution provides that he must swear to answer all questions pertaining to (the unkown of course) his antecedents so far as they relate to his right to vote. This Court does not undertake to say that the registrar does not vary the examination of applicants for registration so as to carry out the intention of the framers of the law; especially when the contrary is charged in the pleadings and judicially declared by the State court, just what were the intentions of the framers of the law at the time of enactmeat. This honorable Court however, has held that "there is nothing tangible" in the fact that the Supreme Court held, that assuming to act "within the circles of permissible action under the limitation of the Federal Constitution" the convention sought to effect a means of obstructing

the exercise of suffrage by the negro race: not "the weak and viscious white men and the weak and vicious black men," but in the language of the Court of last resort in the State, the purpose was to obstruct the exercise of a right by one race, and not of the other race. The question presents itself just at this point as to whether limitations placed upon the negro race because of its race and color by any character of State legislation is "permissible under the limitations of the Federal constitution."

Having briefly called the notice of the Court, to the important contentions unintentionly overlooked by this honorable Court, and the mistake as to the charge made in plaintiff's motion, and the erroneous conclusions, based upon the erroneous assumption of a fact, that the motion contained the charge as to the jury list, as noted in this brief, it is hoped, and plaintiff prays, that the Court will grant a rehearing in this matter, that substantial justice may be done the accused.

Respectfully submitted,

CORNELIUS J. JONES,
Attorney for Plaintiff in Error.

The Supreme Court of the United States.

October Term, 1897.

HENRY WILLIAMS, PLAINTIFF IN ERROR.

No. vs.

THE STATE OF MISSISSIPPI, DEFENDANT IN ERROR.

BRIEF FOR THE STATE OF MISSISSIPPI.

In this case the record discloses the following facts:

Henry Williams, plaintiff in error, was indicted by the grand jury of the County of Washington in the State of Mississippi at the May Term 1896 of the Circuit Court for the murder of one Eliza Brown. On the 15th day of June following the plaintiff in error, Henry Williams, entered a motion before said Circuit Court to quash said indictment because the laws of the State of Mississippi by which the grand jury which returned the indictment into Court was selected, organized and charged are unconstitutional and repugnant to the spirit and letter of the Constitution of the United States, and especially to the 14th amendment thereof. Appellant in his motion to quash said indictment specially charges that sections 241—242 and 244 of article 12, and section 264 of article 14 of the present Constitution of the State of Mississippi, adopted by the Constitutional Convention in 1890, and sections 3643—3644 and 2358 of Code of Mississippi of 1892 are repugnant to the Constitution of the United States in this, that they discriminate against the colored race, of which race appellant is a member—that they abridge the elective franchise of the colored

race, because of their race, color and previous condition of servitude—and also their right to be selected as jurors, and to serve as such in the Courts of the State of Mississippi, because of their race, color and previous condition—and that they deprive appellant and others of his race of the equal benefit and protection of the laws of the State of Mississippi, because of their race, color and previous condition, and that the right which the 14th amendment of the Constitution of the United States guaranteed to him and his race, are abridged and denied him by the aforesaid articles of the Constitution of the State of Mississippi and the aforesaid laws thereof, and that they are therefore violative of the Constitution of the United States.

This motion to quash the indictment was overruled by the Court below.

Appellant then presented to the Court his petition asking that this case be transferred from the State Court to the United States Circuit Court for the Western division of the Southern district of Mississippi, and to support this motion to transfer, presented substantially the same causes which he offered in support of his motion to quash the indictment.

The Court below also overruled this motion, and denied the petition to transfer the case.

The trial of the case was then proceeded with in said Circuit Court upon its merits, and the jury returned into Court a verdict of guilty as charged in the indictment.

Whereupon the plaintiff in error entered his motion to set aside the verdict so rendered against him, and to grant him a new trial, and in support of said motion assigned the following causes:

1st. Because the verdict is contrary to the law and the evidence.

2nd. Because under the law the question of overt demonstration by the deceased, and apprehension of danger therefrom on the part of the accused, was never disproved or put in issue by the State, and under the instructions of the Court on that point the jury was not warranted in bringing the defendant in guilty as charged.

3rd. Because the Court erred in overruling the defendants objection to the testimony of Addie Brown, and permitting the District Attorney to argue the fact concerning a pistol defendant showed her, and erred in refusing to instruct the jury not to consider such fact.

4th. The Court erred in refusing to instruct the jury not to consider argument of District Attorney that deceased carried her money in her stocking, and that the defendant killed her and stripped the stocking down over the deceased's foot and took the money therefrom when there was no such evidence in the case.

5th. The Court erred in refusing to instruct the jury not to consider the confession testified to by witness, I. M. Muckle, because the state failed to show that the said confession by the accused was free and voluntary, and granting the first instruction for the State.

6th. The Court erred in overruling the motion to quash the indictment, and also erred in denying the petition for the removal of the trial into the United States Circuit Court.

—This motion for a new trial was by the Court overruled—

Whereupon the plaintiff in error, Henry Williams, was by the Court, sentenced to be hung by the Sheriff of said county of Washington on the 30th day of July 1896.

The plaintiff in error then appealed his case to the Supreme Court of the State of Mississippi, in which last named Court said case was heard and by said Court the judgment of the Court below was affirmed on the 9th day of November 1896, and the plaintiff in error, Henry Williams, was on the said 9th day of November 1896, by the said Supreme Court of the State of Mississippi, sentenced to be hung by the Sheriff of the said county of Washington on the 10th day of December, 1896.

And to this judgment of the Supreme Court of the State of Mississippi, the plaintiff in error has obtained a writ of error from this honorable Court in order that the action of the said Supreme Court of the State of Mississippi may be reviewed.

Thus we see that there are really but two questions presented by the record in this case which this honorable Court will consider.

1st. The Action of the Court below in overruling appellant's motion to quash the indictment against him.

2nd. The action of the Court below in denying appellant's application for transfer of the case from the State Court to the United States Court.

As the grounds for both motions are substantially the same, we will consider them together.

We respectfully submit that the question for this honorable Court to decide is whether or not sections 241—242 and 244 of article 12, and section 264 of article 14 of the present Constitution of the State of Mississippi, and sections 2358—3643 and 3644 of the present Code of Mississippi (1892) conflict with or are repugnant to the Constitution of the United States, and especially the 14th amendment thereof.

The three sections of article 12 of the Constitution of the State of Mississippi above referred to read as follows:

Section 241. "Every male inhabitant of this State except idiots, insane persons and Indians not taxed, who is a citizen of the United States, twenty one years old and upwards, who has resided in this State two years, and one year in the election district, or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy, and who has paid, on or before the 1st day of February of the year in which he shall offer to vote, all taxes which may have been legally required of him, and which he has had an opportunity of paying according to law for the two preceding years, and who shall produce to the officer holding the election satisfactory evidence that he has paid said taxes, is declared to be a qualified elector; but any minister of the Gospel in charge of an organized church shall be entitled to vote after six months residence in the election district, if otherwise qualified."

Section 242. "The legislature shall provide by law for the registration of all persons entitled to vote at any election, and all persons offering to register shall take the following oath or affirmation: I..... ....do solemnly swear (or affirm) that I am twenty one years old (or I will be before the next election in this county) and that I will have resided in this State two years and..... election district of.....county one year next preceding the ensuing election (or if it be stated in the oath that the person proposing to register is a minister of the Gospel in charge of an organized church, then it will be sufficient to aver therein two years residence in the State and six months in said election district) and am now in good faith a resident of the same, and that I am not disqualified from voting by reason of having been convicted of any crime named in the constitution of this State as a disqualification to be an elector; that I will truly answer all

questions propounded to me concerning my antecedents so far as they relate to my right to vote and also as to my residence before my citizenship in this district; that I will faithfully support the Constitution of the United States and of the State of Mississippi, and will bear true faith and allegiance to the same. So help me God. In registering voters in cities and towns not wholly in one election district the name of such city or town may be substituted in the oath for the election district. Any wilfull and corrupt false statement in said affidavit, or in answer to any material question propounded as herein authorized shall be perjury."

Section 244. "On and after the first day of January A. D. 1892, every elector shall, in addition to the foregoing qualifications, be able to read any section of the Constitution of this State; or he shall be able to understand the same when read to him, or give a reasonable interpretation thereof. A new registration shall be made before the next ensuing election after January the 1st A. D. 1892."

Section 264 of Article 14 of the Constitution of the State of Mississippi, above referred to, reads as follows:

Section 264. "No person shall be a grand or petit juror unless a qualified elector and able to read and write; but the want of any such qualification in any juror shall not vitiate any indictment or verdict. The legislature shall provide by law for procuring a list of persons so qualified, and the drawing therefrom of grand and petit jurors for each term of the Circuit Court."

The three Sections of the Code of 1892 of the State of Mississippi, above referred to, read as follows:

Section 2358. How list of jurors procured—"The Board of Supervisors at the first meeting in each year, or at a subsequent meeting if not done at the first, shall select and make a list of persons to serve as jurors in the Circuit Court for the next two terms to be held more than thirty days afterwards, and as a guide in making the list, they shall use the registration books of voters; and it shall select and list the names of qualified persons of good intelligence, sound judgment and fair character, and shall take them as nearly as it conveniently can from the several election districts in proportion to the number of the qualified persons in each, excluding all who have served on the regular pannell within two years, if there be not a deficiency of jurors."

Section 3643. Managers of election appointed.—

"Prior to every election the commissioners of election shall appoint three persons for each election district to be managers of the election, who shall not all be of the same political party, if suitable persons of different political parties can be had in the district, and if any person appointed shall fail to attend and serve, the managers present, if any, may designate one to fill his place, and if the commissioners of election fail to make the appointments, or in case of the failure of all those appointed to attend and serve, any three qualified electors present when the polls should be opened may act as managers."

Section 3644. Duties and powers of managers.—"The managers shall take care that the election is conducted fairly and agreeably to law, and they shall be judges of the qualifications of electors, and may examine on oath any person duly registered and offering to vote touching his qualifications as an elector, which oath any of the managers may administer."

We respectfully submit to this honorable Court that neither of the Sections of the Constitution of the State of Mississippi, above mentioned, in any manner whatever conflicts with the 14th amendment to the Constitution of the United States, nor is in any manner repugnant thereto, nor does either of the sections of the Code of the State of Mississippi, above referred to. It really does appear to us that the questions thus presented by the record in this case are scarcely open to argument, but that they have been fully decided and adjudicated by this honorable Court in favor of appellee and against appellant in several different cases, among which we cite the cases of Charlie Smith vs. the State of Mississippi—U. S. Reports No. 162 p. 592, and Gibson vs. the State of Mississippi—U. S. Reports No. 162 p. 565, and Dixon vs. the State of Mississippi, also Neal vs. Delaware, U. S. Reports No. 103 p. 370.

Andrews vs. Swartz, U. S. Reports, No. 156 p. 272-276.

Bergeman vs. Backer, U. S. Reports, No. 157 p. 655-659.

Virginia vs. Rieves, U. S. Reports, No. 100 p. 313.

Strauder vs. West Virginia, Reports, No. 100 p. 303.

Ex parte Virginia Reports, No. 100 p. 339.

We respectfully submit that upon close inspection of those provisions of the Constitution of the State of Mississippi, challenged by Plaintiff in error, nothing can be found, not a line or word, which in any manner whatever discriminates against any citizen because of his race, color or previous condition, and the same can be as confidently

asserted of those provisions of the Code of Mississippi complained of by plaintiff in error. Not a word or line in either of them, by any reasonable construction, can be deemed obnoxious to any part of the Constitution of the United States or any law thereof. We think we can confidently assert that the present Constitution of the State of Mississippi nowhere contains a single provision which if fairly interpreted can be held to be obnoxious or repugnant to any provision of the Constitution of the United States or to any law thereof; nor is there a single provision in any statute of Mississippi which can reasonably be so construed. There is nothing in either incompatible with any right or privilege or immunity guaranteed to the colored race by the Constitution of the United States. There is nothing in either which because of race, color or previous condition disqualifies any citizen of the State from voting at any election in said State, or from sitting on the juries, or from as fully enjoying every right, benefit and privilege which any other citizen can; indeed no distinction whatever can be found in either as between the individual white man and the individual colored man, but equal rights, privileges and immunities are guaranteed to all alike, and I presume it will not be contended that the State of Mississippi has not the exclusive jurisdiction to regulate the right of suffrage and the right to serve as jurors, if in so doing she does not in any manner discriminate against any citizen on account of race, color or previous condition of servitude.

In the case of Charlie Smith vs the State of Mississippi, 162 U. S. Reports page 592, above referred to, Mr. Justice Harlan in delivering the opinion of the Court in which it was held that the petition to remove the case from the State Court to the United States Court was properly denied says: "Neither the Constitution nor the laws of the State of Mississippi by their language reasonably interpreted, or as interpreted by the highest Courts of the State show that the accused was denied or could not enforce in the judicial tribunals of the State or in the part of the State where such suit or prosecution was pending any right secured to him by any law providing for the equal civil rights of citizens of the United States or of all persons within the United States.

In the case of Gibson vs the State of Mississippi, 162 U. S. reports p-566 the Court uses the following language: "But they do not support the application for the removal

of this case from the State Court in which the indictment was found, for the reason that neither the Constitution of Mississippi nor the statutes of that State prescribe any rule for or mode of proceedure in the trial of criminal cases which is not equally applicable to all citizens of the United States and to all persons within the jurisdiction of the State, without regard to race, color or pevious condition of servitude." Further on in the same case the Court says: "But when the Constitution and laws of a State as interpreted by its hightest judicial tribunal do not stand in the way of the enforcement of rights secured equally to all citizens of the United States, the possibility that during the trial of a particular case the State Court may not respect and enforce the right to the equal protection of the laws constitutes no ground under the statute for removing the prosecution into the Circuit Court of the United States in advance of the trial." And in the same case the Court say: "The conduct of a criminal trial in a State Court can not be reviewed in this Court unless the trial is had under some statute repugnant to the Constitution of the United States, or was so conducted as to deprive the accused of some right of immunity secured to him by that instrument. Mere error in administering the criminal law of a State, or in the conduct of a criminal trial no Federal right being invaded or denied, is beyond the revisory power of this Court under the statutes regulating its jurisdiction. Citing.

Andrews vs. Swartz, 156 U. S. Reports p. 272-276.

Bergeman vs. Backer, 157 U. S. Reports, p. 655-659.

Indeed it would not be competent for Congress to confer such power upon this or any other Court of the United States."

This Honorable Court held in the case of Neal vs. Delaware, 103 U. S. Reports, page 370, that the 14th Amendment to the Constitution of the United States was broader in its operations than Section 641 of the revised statutes providing for the removal of cases from the State Courts to the Federal Courts.

It can not be successfully contended that a citizen has the right to remove his case from a State Court to the Federal Court unless the State in which the trial is to be had, has since the adoption of the 14th Amendment to the Constitution of the United States enacted some law in violation of or repugnant to said amendment, and it will always be presumed that every constitutional right of the

citizen will be legally observed, carefully protected, and duly enforced in all the State Courts, and if any right which is secured by the Constitution of the United States is disregarded by the State Court, the remedy for the enforcement of these rights is in the Supreme Court of the United States by writ of error.

Neal vs. Delaware, 103 U. S. Reports page 370.

Strauder vs. West Virginia, 100 U. S. Report, p. 103.

Virginia vs. Rieves, 100 U. S. Reports, page 313.

Ex parte Virginia, 100 U. S. Reports, page 339.

Therefore there being nothing in any provision of the Constitution of the State of Mississippi or any of the laws of said State which conflicts with any provision of the Constitution of the United States or any law thereof, the application to remove this case from the State Court to the Federal Court was properly denied, and the motion to quash the indictment properly over-ruled.

The plaintiff in error contends that he should have been indicted and tried by juries selected under the Constitution of the State of Mississippi adopted in 1869, and under the laws of the Code of Mississippi of 1880; that the present Constitution of Mississippi and the laws in pursuance thereof are null and void because the present Constitution adopted in 1890 was never submitted to the people for approval or rejection.

We respectfully submit that this position is untenable because this question has been submitted to and has been passed upon and adjudicated by the Supreme Court of the State of Mississippi in the case of Sproule vs. Fredericks, 69th Mississippi Reports, page 898, in which case that Court decided that it was entirely competent and proper for the Convention which framed the present Constitution of the State of Mississippi to put it into operation without submitting it for ratification to a vote of the people, and this decision of the Supreme Court of the State of Mississippi is conclusive on this point, because the decisions of the highest Courts of a State in construing its own Constitution and laws are conclusive.

Randall vs. Brigham, 7 Wall, page 541.

Provident Institution vs. Mass., 6 " page 630.

We submit therefore that it was right and proper that the accused should have been indicted and tried by juries selected under the present Constitution and laws of the State of Mississippi, and that it would have been error to have done otherwise.

But even if the right claimed by the Plaintiff in error to be indicted by a grand jury and tried by a petit jury selected as provided by the Code of 1880, and this claim is founded on Section 283 of the present State Constitution; certainly no Federal Question is involved and no right of his which is guaranteed to him by the Constitution of the United States or any law thereof is brought in issue. Because as above said the Supreme Court of the State of Mississippi has settled this question and as to this is conclusive.

Randall vs. Brigham, 7 Wall 541.

As all the questions which are presented by the record in this case for decision and as every provision of the Constitution of the State of Mississippi and every law thereof which is challenged by the plaintiff in error in this case were passed upon and adjudicated by the Supreme Court of the State of Mississippi in the case of John Dixon vs. the State of Mississippi on the 9th day of November 1896, and as the Supreme Court of said State of Mississippi in affirming the judgment of the Court below in this case which we are now considering announces the fact that this cause is construed by the opinion this day delivered by Chief Justice Cooper in the case of John Dixon vs. the State. I here now beg leave to incorporate in my brief the able and elaborate opinion of Chief Justice Cooper in the above named case of John Dixon vs. the State of Mississippi, which reads as follows:

Dixon vs. the State.

Supreme Court of Mississippi, Nov. 9th 1896.

Cooper, C. J.—"The appellant has been indicted, convicted and sentenced to imprisonment for life for the murder of one Nancy Minor. In the Court below the defendant made a motion to quash the indictment, and when the motion was overruled, he moved for a transfer of the cause from the State to the Federal Court. This motion was also denied. The action of the Court in refusing to quash the indictment and in denying the petition for a transfer of the cause constitute the principal errors assigned. The motion and petition set out in effect the same facts; and affidavits of several persons were filed that the matters therein stated were, as affiants believed true. The purpose of the motion seems to have been primarily to assail the validity of all the laws passed since the adoption of our recent Constitution and of that Constitution itself, on the ground that said Constitution and laws are obnoxious to the 14th Amendment to the Constitution of the United States. The mo-

tion is too long to be inserted in this opinion. It states some facts, many inferences and deductions and an argument to show that the conditions resulting from the adoption of the Constitution are incompatible with the rights guaranteed to the colored race by the 14th Amendment. Compressed within reasonable limits the substance of the motion is that the Constitutional Convention was composed of one hundred and thirty-four members, of which one hundred and thirty-three were whites and one only a negro; that the purpose and object of said Constitution was to disqualify by reason of their race, color and previous condition of servitude one hundred and ninety thousand negro voters; that the Constitution was not submitted to a vote of the people, and that the representation of the State in Congress has not been reduced as it should have been upon the disqualification of so great a number of voters; that Sections 241, 242 and 244 of the Constitution of this State are in conflict with the 14th Amendment of the Constitution of the United States because they vest in administrative officers the power to discriminate against citizens by reason of their color; and that the purpose of so investing such officers with such power was intended by the framers of the State Constitution to the end that it should be used to discriminate against the negroes of the State. We will recur to the contents of the motion hereafter for the purpose of considering such averments as seem more nearly related to the subject under investigation, viz. The competency and legality of the grand jury by which the indictment against appellant was returned. At this point in the investigation it is sufficient to say that we have no power to investigate or decide upon the private individual purpose of those who framed the Constitution, the political or social complexion of the body of the Convention, and have no concern with the representation of the State in Congress. We can deal only with the perfected work, the written Constitution adopted and put in operation by the Convention. We have heretofore decided that it was competent for the Convention to put the Constitution in operation without submitting for ratification by a vote of the people.

Sproule vs. Fredericks, 69 Miss. 898.

We find nothing in the Constitutional provisions challenged by the appellant which discriminate against any citizen by reason of his race, color, or previous condition of servitude. Section 241 declares who are qualified electors, Section 242 makes it the duty of the legislature to provide for the registration of persons entitled to vote, and

Section 244 declares that "On and after the first day of January A. D. 1892 every elector shall in addition to the foregoing qualifications be able to read any Section of the Constitution of this State: or he shall be able to understand the same when read to him or give a reasonable interpretation thereof. A new registration shall be made before the next ensuing election after January the first A. D. 1892."

All these provisions if fairly and impartially administered apply with equal force to the individual white and negro citizen. It may be and unquestionably is true that so administered their operation will be to exclude from the exercise of the elective franchise a greater proportionate number of colored than of white persons. But this is not because one is white and the other is colored but because of superior advantages and circumstances possessed by the one race over the other, a greater number of the more fortunate race is found to possess the qualifications which the framers of the Constitution deemed essential for the exercise of the elective franchise.

We have searched the record in vain to discover any averment that the officers of the State charged with the duty of selecting jurors in any manner exercised the power devolved upon them to the prejudice of the appellant by excluding from the jury list members of the race to which he belongs. The motion contains much irrelevant matter set up with great prolixity and in obscure language. But repeated and careful examination conducts us to the conclusion that much of its seeming obscurity vanishes when we read the motion in the light of the opinion entertained by counsel as to how the supposed discrimination has been made. He did not intend to charge by the motion that the officers by whom the grand jury was selected violated the law, but that they were by the law under which they acted required to select jurors from certain lists furnished to them by the officers charged with the duty of holding elections in the State and that these election officers in making such lists discriminated against the race of appellant. In this view the motion was properly denied for the reason that jurors are not selected from or with reference to any lists furnished by such election officers. No such list is required to be made or used in selecting jurors nor does the motion distinctly charge that any such was returned to the officers charged with the duty of selecting jurors and by them used. The motion is based on the assumption that such list was essential to the selection of the grand jury and without it no jury could be drawn, and that the list was made by discriminating against the negro race. Our laws in reference

to elections and in reference to the selection of grand and petit juries are totally distinct. To be an elector or to serve upon a jury one must be registered as a voter. But the acts and doings of those charged with holding elections can exercise no influence upon those by whom juries are selected. One may be denied the right to vote by the election officers and yet be permitted to sit upon juries grand or petit; and one may be inelligible to sit upon a jury and yet qualified and permitted to vote. By Section 241 of the Constitution it is provided that "Every male inhabitant of this State except idiots, insane persons and Indians not taxed, who is a citizen of the United States, twenty one years old and upward, who has resided in this State two years and one year in the election district or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, embezzlement or bigamy, and who has paid on or before the first day of February of the year in which he shall offer to vote all taxes which may have been legally demanded of him and which he has had an opportunity of paying according to law for the two preceding years and who shall produce to the officer holding the election satisfactory evidence that he has paid said taxes, is declared to be a qualified elector; but any minister of the gospel in charge of an organized church shall be entitled to vote after six months residence in the election district if otherwise qualified." Section 264 declares who shall be qualified as jurors. It is as follows: "No person shall be a grand or petit juror unless a qualified elector and able to read and write; but the want of any such qualifications in any juror shall not vitiate any indictment or verdict. The legislature shall provide by law for procuring a list of persons so qualified and the drawing therefrom of grand and petit jurors for each term of the Circuit Court." It is not necessary that one desiring to register shall have paid his taxes as prescribed by Section 241. That has to do with voting and not registration.

Bew vs. the State, 71 Miss., 1.

One who has registered and has in fact paid his taxes although he has not offered to vote and therefore has not produced to the officers holding an election satisfactory evidence of such payment, and who can read the Constitution (Mabry vs. the State, 71 Miss., 716) and write is qualified under the Constitution to sit as a juror. It is true that Section 241 in declaring who are electors seemingly imposes

as an essential qualification that the elector not only shall have paid his taxes, but also shall have produced satisfactory evidence thereof to the officers holding an election. But the Section must have a reasonable and sensible construction Registration and payment in fact of the taxes as prescribed are the substantial things required to qualify one as an elector. Proof of the fact that taxes have been paid to the satisfaction of the election officers is also required when the elector comes to vote; but when he is presented as a juror such payment is proved before the Court and not by the fact that he has been permitted to vote. If in truth he has paid his taxes and possesses the other requisite qualifications, the fact that he has never offered to vote and therefore has never produced "to the officers holding an election satisfactory evidence that he has paid said taxes", or if offering to vote has failed to satisfy the officers that he has paid taxes does not render him inelligible as a juror.

Section 2358 of the Code provides how the jury list shall be made. It provides that "the Board of Supervisors at the first meeting in each year or at a subsequent meeting if not done at the first, shall select and make a list of persons to serve as jurors in the Circuit Court for the next two terms to be held more than thirty days afterwards, and as a guide in making the list, they shall use the registration list of voters, and it shall select and list the names of qualified persons of good intelligence, sound judgment and fair character, and shall take them as nearly as it conveniently can from the several election districts, in proportion to the number of qualified persons in each, excluding all who have served on the regular pannel within two years, if there be not a deficiency of jurors." It is from the list thus made that grand and petit jurors are drawn. The Sections of the Code under which the appellant claims that he was discriminated against have relation, not to the selection of juries, but to the subject of registration and voting; and his contention is not that persons entitled to register were denied registration by the registrar, but that the managers of elections are by the law made judges of the qualifications of electors offering to vote and have denied to persons qualified to vote the right so to do. Conceding this to be true we fail to perceive in what manner the appellant has been injured. The managers are required to supervise the election and are authorized to examine on oath any person duly registered and offering to vote touching his qualifications as an elector. They are the judges of the qualifications of such persons and they may deny the right to vote to one not entitled though he be registered. But they have no power to strike the name of such person from the

books nor to put any additional names thereon. The registration book of the County does not go into the possession of the managers of the election, but they are furnished with poll books which contain the names of the registered voters in the district, copied from or made cotemporaneously with the registration book. As votes are cast one of the clerks of the election takes down on a list the names of the voters, while the other enters a check upon the poll book opposite the name of such person; and at the close of the election the votes are counted and the result declared. And the statute provides that "the statement of the result of the election district shall be certified and signed by the managers and clerks, and the poll books, tally lists, list of voters, ballot boxes and ballots shall all be delivered as required to the commissioners of election." Code Section 3670. This is the only list known to us that the law requires to be made by the officers. It does not show or purport to show who are qualified electors but only who have voted; and it has no relation except to matters connected with the election and performs no function in reference to the selection of jurors. The Boards of Supervisors by which bodies jury lists are made never see these lists. They are returned and dealt with by the election commissioners, a wholly different body, and so if it be true that the managers of elections have discriminated against colored voters, and unlawfully denied them the right to vote, it does not appear how the appellant has been deprived of any advantage or protection afforded to him either by the Constitution or laws of this State or by the Constitution of the United States. There is no suggestion in this motion that the jury commissioners were guilty of any fraud or discrimination in selecting the jurors. If in truth there was no registration book in the county to guide them in their selection of the jurors, their action in making the jury list was irregular, and upon objection made before the grand jury was empannelled the pannel would have been quashed.

Purvis vs. the State (Miss.,) 14 South, 268.

But our statute provides that "before swearing any grand juror as such he shall be examined by the Court on oath touching his qualifications: and after the grand jurors shall have been sworn and empannelled, no objections shall be raised by plea or otherwise to the grand jury: but the empannelling of the grand jury shall be conclusive evidence of its competency and qualification: but any party interested may challenge or except to the array for fraud."

Head vs. the State, 44 Miss., 731.

Durrah vs. the State, 44 Miss , 789.

In Neal vs. Delaware, 103 U. S. 370, and Gibson vs. State of Mississippi, 162 U. S. 565., the Supreme Court of the United States has thoroughly discussed the subject of the right of a negro to the impartial protection of the law, and has clearly expressed the circumstances under which, and the means by which that right is to be vindicated. If by the Constitution or laws of the State negroes are by reason of their race, color or previous condition of servitude, excluded from juries or in such other manner discriminated against as that fair and impartial trial can not be had in the State Courts, then a negro proceeded against in the Courts of the State may have his cause removed to the Courts of the United States for trial. If there is no discrimination by the law but the complaint is that by the act of the officers of the State, charged with the administration of fair and impartial laws, discrimination has been made against the race, the defendant may not have a removal of his cause, but must make his defense in the State Courts, and appeal from the final judgment of the Supreme Court of the State to the Supreme Court of the United States. In Gibson vs. the State of Miss. Supra, the Supreme Court of the United States declared that neither the Constitution nor laws of this State prescribed any rule for, or mode of proceedure in the trial of criminal cases which is not equally applicable to all citizens of the United States, and to all persons within the jurisdiction of the State, without regard to race, color or previous condition of servitude. We can discover nothing in the record which shows that the appellant either by the laws of this State or by their administration, has been denied the right of a fair and impartial trial. The motion to quash the indictment, and for removal of the case were properly overruled. We have dealt with the case upon the assumption that the facts set out in the motion are true. No objection was made in the Court below because the proof was made by affidavits instead of by witnesses, and it is common practice in our Courts in the absence of objection to hear affidavits on motions.

The error assigned touching the action of the Court in admitting evidence of the State of feeling of appellant towards the woman, Lavinia, at whom the shot was fired that killed Nancy Minor is not maintainable. The defendant himself on cross examination of the witness, Eliza Minor, drew out this evidence. But aside from this the evidence was entirely competent as tending to show quo animo the fatal shot was fired. The judgment is affirmed."

Thus we see that every question presented by the record in this case has been fully adjudicated by the Supreme Court of the State of Mississippi against the contention of the plaintiff in error and in favor of defendant in error, and we also respectfully submit that the judgment of the Supreme Court of Mississippi on all these points has been approved by this honorabl Court in the decisions above referred to and others.

In the case of Virginia vs. Rieves, 100, U. S. 319-320, above referred to Mr. Justice Strong uses the following language: "It is evident therefore that the denial or inability to enforce in the judicial tribunals of the State rights secured to a defendant by any law providing for the equal civil rights of all persons of the United States, of which Section 641 speaks is primarily if not exclusively a denial of such rights or an inability to enforce them resulting from the Constitution or laws of the State rather than a denial first made manifest at the trial of the case, in other words, the statute has reference to a legislative denial or inability resulting from it. The statute was not therefore intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial."

Mr. Justice Field in delivering his separate opinion in the same case page 333 says: "The denial of rights or the inability to enforce them to which the Section refers is in my opinion such as arises from legislative action of the State. If any executive or judicial officer exercises power with which he is not invested by law, and does unauthorized acts the State is not responsible for them. The action of the judicial officer in such a case where the rights of a citizen under the laws of the United States are disregarded, may be reviewed and corrected or reversed by this Court, it can not be imputed to the State so as to make it evidence that she in her sovereign or legislative capacity denies the rights invaded or refuses to allow their enforcement."

So we contend that the doctrine laid down in these decisions interpreting, construing and defining the operation, purpose and effect of Section 641 of the revised statutes in connection white the 14th Amendment to the Constitution of the United States has been fully adjudicated and settled by this honorable Court.

Just here in this connection we would respectfully call the attention of this honorable Court to the facts as alleged and sworn to by plaintiff in error in this case; both in his motion to quash the indictment against him and in his petition to remove his case from the State Court to the United

States Court. Plaintiff in error does not assert, charge or complain that any provision of the Constitution of the State of Mississippi, or any provisions of any law thereof has been violated by any one at any time or place either in letter or in spirit; but on the contrary alleges repeatedly that these provisions of the State Constitution and laws of the State of which he complains, have all been enforced according to the letter and intention thereof. He says that the legislature which was elected in 1891 and which enacted the laws complained of was elected in pursuance of the Constitution and that the election itself was held in pursuance thereof: he also says that it is the enforcement of these laws that denies to him and his race their rights, and not the violation of them, or the failure to enforce them.

He also says that the present Constitution and laws of the State of Mississippi of which he complains give to certain officers certain discretion, and then alleges that this discretion has been exercised in accordance with the letter and intention of the law, and nowhere charges that said discretion has been abused.

He also says that the present Constitution of the State of Mississippi authorized the legislature of the State to enact certain laws in order to enforce or carry out the organic law, and that the legislature of 1892 enacted the laws complained of in strict compliance with the Constitution of the State, and that it is the enforcement of all these laws that deprives him of his rights, and it is really because of the enforcement of both the organic and statute laws of the State of Mississippi that he here seeks relief, and not on account of the violation of either or any of them.

It is true that plaintiff in error has a good deal to say as to the motives which actuated the framers of these laws; we think the surest way to arrive at their motive is by a proper Construction and interpretation of the laws themselves, and these laws have been favorably construed by all the Courts in the country, and simply to impugn the motives of the action of a sovereign State is no argument whatever and we think should not be indulged in without sufficient grounds therefor.

We therefore respectfully submit that the record in this case presents to this Honorable Court for decision, this one question—are the provisions of the present Constitution of the State of Mississippi, or of the present Code of Mississippi, above referred to and set out and which plaintiff in error complains of, in conflict with the Constitution

of the United States or the laws thereof? According to the authorities above cited we confidently answer in the negative, and respectfully submit that this case should be affirmed.

C. B. MITCHELL,
ATTORNEY FOR STATE OF MISSISSIPPI.